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No. 05-998

Supreme Court, U.S.
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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN RESENDIZ-PONCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that the omission of an offense element from the petit jury's instructions does not constitute structural error. That rule—which the Court reaffirmed in *Washington* v. *Recuenco*, 126 S. Ct. 2546 (2006)—compels the conclusion that the omission of an offense element from a federal indictment does not constitute structural error either. Respondent and his amici do not ask this Court to revisit *Neder*, nor do they offer any valid justification for concluding that the failure to submit an offense element to the grand jury would necessitate automatic reversal when the failure to submit an offense element to the petit jury would not. As in *Neder* and *Recuenco*, the error at issue should be subject to harmless-error review.

Respondent's other arguments lack merit. To the extent that respondent suggests that errors at the grand jury stage are not susceptible to harmless-error analysis at all, that suggestion is foreclosed by this Court's pre-

cedents. And to the extent that respondent renews his claim that the indictment in this case did not provide him with sufficient notice to enable him to prepare his defense, that claim also fails, because respondent cannot show that he suffered prejudice from any deficiency in the indictment. Because the petit jury was correctly instructed concerning the omitted element and found that the omitted element had been proved beyond a reasonable doubt, any error was harmless, and the judgment of the court of appeals should be reversed.

A. The Omission Of An Offense Element From A Federal Indictment Is Analogous To The Omission Of An Offense Element From The Petit Jury's Instructions, Which Is Subject To Harmless-Error Review

This Court recently reaffirmed the principles that "most constitutional errors can be harmless" and that, "[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Recuenco*, 126 S. Ct. at 2551 (citations omitted). The error at issue in this case is closely analogous to the error in *Neder*, and neither respondent nor his amici offer any principled basis for treating it differently.

1. Respondent correctly notes (Br. 13) that *Neder* itself "concerned jury instructions" and that, in *Neder*, "[t]here was no issue concerning the indictment." The reasoning of *Neder*, however, cannot be confined to instructional errors specifically, or to trial errors more generally. Indeed, in *Recuenco*, the Court held that an error in enhancing a sentence based on a finding by the judge rather than the jury can be harmless on the ground that it was "indistinguishable" from the error in

Neder, notwithstanding the fact that the error was fully realized only at sentencing. 126 S. Ct. at 2552.[1] Like the error in *Recuenco*, the error in this case—the failure to submit an offense element to the grand jury—has no better claim to structural error than the failure to submit an element to the petit jury. In fact, the error here is an even weaker candidate for structural error than the error in *Neder*, for reasons that respondent and his amici do not dispute: for example, because the Fifth Amendment right to an indictment by grand jury, unlike the Sixth Amendment right to a trial by a petit jury, has not been incorporated against the States as an essential requirement of fundamental fairness, and because the petit jury provides numerous protections for the accused that the grand jury does not. See U.S. Br. 14-17.

2. Respondent repeatedly suggests (Br. 1-2, 4-5, 13-14) that the error at issue here nevertheless "necessarily renders [the] trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986), and is thus structural, because the Fifth Amendment provides that "[n]o person shall be held to answer for a [crime] unless on * * * indictment of a Grand Jury." But the Fifth Amendment no more explicitly provides that every element of a criminal offense be charged in an indictment than the Sixth Amendment provides that every element of a criminal offense be submitted to the petit jury. The Fifth

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[1] Amicus NACDL contends that, in *Recuenco*, the Court "recogni[zed] that *Neder* governs constitutional errors 'at trial alone.'" Br. 23 (quoting *Recuenco*, 126 S. Ct. at 2551). The sentence in *Recuenco* from which NACDL quotes, however, does not support that proposition: indeed, the word "alone" does not even modify the word "trial." See 126 S. Ct. at 2551 ("We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal.").

Amendment states that "[n]o person shall be held to answer" except by indictment, just as the Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to [trial] by an impartial jury." In both cases, the omission of an offense element can violate mandatory constitutional language that appears absolute.[2] But *Neder* made clear that a violation of the Sixth Amendment's mandatory text is not structural. Nothing in the language of the Fifth Amendment elevates the right to indictment by a grand jury over the Bill of Rights' other important guarantees.[3]

3. Relying on a footnote in this Court's recent decision in *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), respondent contends (Br. 1) that, even if the error at issue does not necessarily render the trial fundamentally unfair, it should be treated as structural because, in this context, "the harmless error inquiry is irrelevant to remedying the constitutional error." In that footnote, however, the Court cited only its decision

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[2] The right to indictment by a grand jury, like the right to trial by a petit jury, can be waived. See Fed. R. Crim. P. 7(b), 23(a).

[3] Quoting this Court's decision in *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 802 (1989), respondent suggests (Br. 5) that the omission of an offense element constitutes "a defect so fundamental that it causes * * * the indictment no longer to be an indictment." In *Midland Asphalt*, however, this Court considered only whether a particular type of indictment defect (an isolated breach of the secrecy requirement) was "so fundamental" that the denial of a motion to dismiss alleging that defect should be immediately appealable. 489 U.S. at 802. The Court rejected that suggestion and in no way indicated that the omission of an offense element constituted such a fundamental defect. It is settled law that the denial of a motion to dismiss an indictment on the ground that it omitted an offense element is not immediately appealable. See, *e.g.*, *United States* v. *Bird*, 359 F.3d 1185, 1188-1189 (9th Cir. 2004).

in *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), for the proposition that an error may be structural where harmlessness is "irrelevant." *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4. *McKaskle* is readily distinguishable, because it involved the right to self-representation at trial—a right that implicates values of individual dignity and autonomy wholly distinct from the values of fairness and accuracy implicated by most other procedural rights (including the right to indictment by a grand jury). See *Faretta* v. *California*, 422 U.S. 806, 832-834 (1975).

Denial of the right to self-representation usually *increases* the likelihood that the defendant will obtain a *favorable* outcome at trial, such that it would be nonsensical to apply harmless-error analysis. See *McKaskle*, 465 U.S. at 177 n.8. Nothing similar can be said about the omission of an element from an indictment. Even if the indictment is deficient, the court can still properly instruct the jury, and the defendant can still have adequate notice. In such a case, the indictment error will have *no* effect on the ultimate outcome at trial—and thus can appropriately be treated as harmless.

4. Again relying on this Court's decision in *Gonzalez-Lopez*, respondent argues (Br. 24) that the error at issue should be treated as structural because it would require excessive speculation (and would thus be too difficult) to assess the harmlessness of the error. That argument, however, proves far too much, because it suggests that *any* grand jury error should be treated as structural—in contravention of this Court's decisions in *United States* v. *Mechanik*, 475 U.S. 66 (1986), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), which held that various grand jury errors are susceptible to harmless-error review. Finding that the omission of an element from the indictment is harmless

is no more speculative than finding that the omission of an element from the jury instructions is harmless. A grand jury error would be structural only if a reviewing court would effectively have to perform the *entirety* of the grand jury's function in order to determine whether the error was harmless. See, *e.g.*, *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986); cf. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (administration of defective reasonable-doubt instruction to petit jury).

B. This Court's Decisions Concerning Grand Jury Errors Support The Conclusion That The Omission Of An Offense Element From A Federal Indictment Is Subject To Harmless-Error Review

Respondent and his amici cannot validly distinguish this Court's decisions applying harmless-error and plain-error analysis to grand jury errors.

1. Respondent contends (Br. 12) that this Court's decision in *Mechanik*, *supra*, is distinguishable on the ground that *Mechanik* concerned "the issue of factual guilt," whereas this case involves "a matter of law and not a matter of fact." That distinction is illusory. It is true that the question whether a federal indictment omits an element of the offense presents a legal question, subject to *de novo* review on appeal. Like the error in *Mechanik*, however, the error at issue does implicate the issue of "factual guilt." A reviewing court can properly ask whether, but for the error, it is clear beyond a reasonable doubt that a rational grand jury would still have concluded that there was probable cause to believe that the accused had committed the charged crime.

Respondent's amici seek to distinguish *Mechanik* and *Bank of Nova Scotia* on the ground that those cases involved non-constitutional errors. NACDL Br. 18-19;

NAFD Br. 22-23. But this Court has often recognized that most constitutional errors can be harmless. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991); *United States* v. *Lane*, 474 U.S. 438, 446 n.9 (1986). Nothing in *Mechanik* or *Bank of Nova Scotia* suggests a different rule for grand jury errors. While the error at issue is obviously not identical to the errors in *Mechanik* and *Bank of Nova Scotia*, it is analogous in the most important sense: the error does not automatically preclude a fundamentally fair proceeding or wholly vitiate the grand jury's performance of its constitutionally assigned function.

2. Respondent's amici contend that the error at issue is instead comparable to the error in *Vasquez*, *supra*: *i.e.*, purposeful racial discrimination in the selection of the grand jury, which the Court held to be structural. See NACDL Br. 6-7; NAFD Br. 13-14. That comparison lacks merit. In *Vasquez*, "the structural protections of the grand jury [were] so compromised as to render the proceedings fundamentally unfair." *Bank of Nova Scotia*, 487 U.S. at 257; see *Vasquez*, 474 U.S. at 263-264. Although the Court has not held that discrimination in the selection of the grand jury is the *only* type of grand jury error that would qualify as structural, the omission of an offense element from the indictment does not rise to that level. Unlike discrimination in the selection of the grand jury, the omission of an offense element does not systematically infect the grand jury's decisionmaking process, and thus does not constitute the type of error that necessarily results in fundamental unfairness. See U.S. Br. 13-17; pp. 3-4, *supra*.

NAFD relies (Br. 15-18) on the portion of *Vasquez* suggesting that a grand jury need not indict even where there is probable cause to do so (and that it would thus

be impossible to analyze the error in that case for harmlessness). Because that portion of *Vasquez* was not "necessary to [the] result" in that case, however, it should be treated as dictum. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996). The Court's holding in *Vasquez* ultimately rested on its determination that "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." 474 U.S. at 263-264. Were it otherwise, *Vasquez* would be irreconcilable with *Mechanik* and *Bank of Nova Scotia*, because the necessary implication of the view that a grand jury can legitimately choose not to indict notwithstanding the existence of probable cause would be that *no* grand jury errors could be analyzed for harmlessness.[4]

3. This Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), further supports the conclusion that the omission of an offense element can constitute harmless error. As respondent notes (Br. 14-15), *Cotton* involved an unpreserved error, and thus entailed application of the plain-error, rather than the harmless-error, doctrine. But the Court's holding that the error at issue—the omission of a sentence-enhancing fact from an indictment (along with the failure to submit that fact to the petit jury)—did not constitute reversible plain error because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, see 535 U.S. at 632-633, necessarily implies that such an error did not *automatically* affect a defendant's substantial rights—and that the error was therefore not

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[4] In any event, the portion of *Vasquez* on which NAFD relies simply cannot be squared with the history of the grand jury, which refutes the proposition that a grand jury may legitimately choose not to indict even in the face of probable cause. See U.S. Br. 28-33; pp. 14-16, *infra*.

structural. See *Neder*, 527 U.S. at 9 (citing *Johnson* v. *United States*, 520 U.S. 461 (1997)).

Amicus NACDL contends (Br. 15-17) that (1) the error in *Cotton* implicated only the "apprisal" function, and not the "screening" function, of an indictment, and (2) the fact that an error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings, does not necessarily mean that the error is not structural. As to the first point, this Court's recent decision in *Recuenco* makes clear that the omission of a sentence-enhancing fact is functionally equivalent to the omission of an offense element, see 126 S. Ct. at 2552—and thus that, to the extent that the grand jury performs a screening function, that function is equally implicated where a sentence-enhancing fact (as to which probable cause may be lacking) is omitted. As to the second point, this Court did *assume* in *Johnson* that the omission of an offense element from the petit jury's instructions might be structural, but went on to hold that, even if so, it is not reversible plain error when the evidence on the omitted element is overwhelming and uncontested. See 520 U.S. at 469-470. But NACDL fails to cite a single case in which this Court has actually *held* that an error that does not seriously affect the fairness, integrity, or public reputation of judicial proceedings is nevertheless structural. The only case that NACDL does cite, *Davis* v. *United States*, 411 U.S. 233 (1973), is inapposite. In *Davis*, the Court held only that a defendant who had failed to raise a timely claim of racial discrimination in the selection of his grand jury could not pursue that claim for the first time in a motion for postconviction relief under 28 U.S.C. 2255—not that such discrimination would not constitute reversible plain error. 411 U.S. at 245. *Davis*, moreover, was decided

more than a decade before *Vasquez*, in which the Court deemed such discrimination to be structural error.

Respondent invokes (Br. 7) *Ex parte Bain*, 121 U.S. 1 (1887), and several prior cases for the proposition that the omission of an offense element from a federal indictment automatically requires reversal. To the extent that those cases rely on the premise that indictment defects are jurisdictional, however, they are no longer good law after *Cotton*. See 535 U.S. at 630.

C. Notice Concerns Do Not Mandate Treating Indictment Errors As Structural

Respondent's claim that the indictment failed to provide sufficient notice of the nature of the charge against him likewise does not justify automatic reversal.

1. Contrary to respondent's repeated suggestions (Br. 3, 20, 23), a claim that an indictment is deficient because it fails to allege all of the elements of the offense is conceptually distinct from a claim that the indictment is deficient because it fails to provide sufficient notice of the nature of the charge. Whereas the former claim is rooted only in the Grand Jury Clause of the Fifth Amendment, the latter claim is also based on other constitutional provisions: most notably, the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation."[5] Whereas the requirement underlying the former claim is designed to ensure that the grand jury has considered all of the elements of the offense before deciding to indict, the requirement underlying the latter claim is de-

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[5] The Sixth Amendment, unlike the Grand Jury Clause of the Fifth Amendment, applies in federal and state prosecutions alike. See, *e.g.*, *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948).

signed to ensure that the accused is sufficiently apprised of the charge that he can prepare his defense.

2. Respondent and his amici do not dispute that the express notice requirement of the Sixth Amendment is violated only if the defendant can show that he suffered actual prejudice from any deficiency. Instead, they seemingly contend that, in federal prosecutions subject to the Grand Jury Clause, it is not necessary to show prejudice in order to prevail on a claim that the indictment fails to provide sufficient notice. There is no justification, however, for treating notice claims in federal and state prosecutions differently.

In contending that the indictment in this case provided insufficient notice (and that the deficiency in the indictment warrants automatic reversal), respondent and his amici primarily rely on this Court's decisions in *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Russell* v. *United States*, 369 U.S. 749 (1962). Resp. Br. 8-9; NACDL Br. 10-14; NAFD Br. 4-7. As a preliminary matter, both *Stirone* and *Russell* can be distinguished on their facts. In *Stirone*, it is clear that the factual theory advanced in the indictment (*i.e.*, that an extortion violated the Hobbs Act, 18 U.S.C. 1951, by obstructing commerce in sand) affirmatively *conflicted* with a factual theory advanced at trial (*i.e.*, that the alleged extortion obstructed commerce in steel). 361 U.S. at 213-215. And in *Russell*, although the indictment itself merely alleged the disputed element without providing any factual detail (*i.e.*, that the defendants had refused to answer a question that was "pertinent to the question under inquiry" by Congress, in violation of 2 U.S.C. 192), the Court pointedly noted that, with regard to at least one of the defendants, the government had presented a *different* factual theory (or no theory at all) "[a]t every

stage in the ensuing criminal proceeding." 369 U.S. at 768.[6] Where a defendant is led to believe (whether by the indictment or by subsequent representations) that the government will prove an element by a different means from that ultimately used at trial, it is more likely that the defendant will be able to establish prejudice on the ground that he relied on the government's earlier representations in preparing his defense. That situation differs from a situation in which the indictment is merely "drawn in general terms" and thereby does not misrepresent the government's factual theory in advance of trial. *Stirone*, 361 U.S. at 218.

In this case, respondent cannot show that the government ever identified any different "overt acts" from those ultimately proved at trial—*i.e.*, that respondent presented false identification at the border and that respondent made contradictory statements concerning his intended destination.[7] Because the indictment at most

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[6] *Russell* is further distinguishable in that the Court relied heavily on a unique function of an indictment under 2 U.S.C. 192: namely, that it provide enough detail to permit federal courts to decide, as a matter of law and before trial, whether the question put to the witness was "pertinent to the question under inquiry" by Congress. 369 U.S. at 757-759, 772; see *id.* at 756-757. While *Russell* did rely more generally on the inability of later documents (such as a bill of particulars) to cure a defective grand jury indictment, on the ground that it would "deprive the defendant of a basic protection * * * [that] a grand jury was designed to secure," *id.* at 770, *Russell* did not examine *that* issue from the vantage point of harmless-error analysis. Instead, it relied chiefly on notice-related concerns in reversing. *Id.* at 771-772.

[7] As respondent notes (Br. 20), the government did contend before trial that the indictment sufficiently alleged the "overt act" element by simply alleging that respondent had engaged in an "attempt[]" to reenter unlawfully. See J.A. 15. That contention, however, was entirely consistent with the government's evidence at trial, which merely elaborated on how that "attempt" occurred. See J.A. 29-33, 35-37.

failed sufficiently to inform respondent of the factual theory on which the government intended to proceed, and did not affirmatively mislead respondent with regard to that theory, this is not a case in which the government could be said to have constructively amended the indictment and thereby "shift[ed] its theory of criminality." *Russell*, 369 U.S. at 768.

In any event, to the extent that *Stirone* and *Russell* held that automatic reversal is warranted for certain types of deficiencies in notice, the Court arrived at that view before it had generally recognized that constitutional errors are susceptible to harmless-error analysis. See *Chapman* v. *California*, 386 U.S. 18, 22 (1967). Notably, although the Court has repeatedly listed errors that it deems to be "structural," it has never included notice-related errors of the type at issue in *Stirone* and *Russell*. See, *e.g.*, *Gonzalez-Lopez*, 126 S. Ct. at 2564; *Johnson*, 520 U.S. at 468-469; *Fulminante*, 499 U.S. at 309-310. Accordingly, neither *Stirone* nor *Russell* compels the conclusion that all notice-related deficiencies in indictments automatically require reversal.

3. Respondent generically contends (Br. 28-30) that he suffered prejudice from the alleged deficiency in notice here. But respondent fails to identify any particular way in which the failure to specify in the indictment the "overt acts" on which the government relied actually affected the preparation or presentation of his defense.[8]

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[8] At one point, respondent does suggest (Br. 29) that, if the government had identified the "overt acts" on which it intended to rely "[i]n its opening statement," he might have testified that "he physically crossed the line for the purpose of asking whether he could use his cousin's documents for his own entry" and that "he lied to the agent for the purpose of extricating himself from a bad situation." At a minimum, however, respondent does not dispute that the alleged "overt acts" were

Nor could respondent plausibly do so, in light of the fact that the indictment identified the date and place of the attempted unlawful reentry (and thus provided respondent with sufficient factual information with which to prepare his defense in the first place). This case therefore demonstrates why the failure to provide sufficient notice in the indictment does not warrant the extraordinary remedy of automatic reversal.

D. Historical Evidence Concerning The Role Of The Grand Jury Does Not Suggest That The Omission Of An Offense Element From The Indictment Constitutes Structural Error

Grand juries have occasionally refused to return indictments (just as petit juries have occasionally refused to return guilty verdicts) when there was apparently sufficient evidence to do so. That history, however, no more shows that grand juries may *properly* refuse to indict in the face of probable cause than that petit juries may *properly* engage in nullification. See U.S. Br. 28-33. Respondent's amici draw different conclusions from that history: namely, that it is *legitimate* for a grand jury not to indict in the face of probable cause and that the failure to instruct the grand jury on an offense element should therefore be treated as intrinsically harmful. Amici are mistaken on both counts.

1. NAFD concedes (Br. 21-22), as it must, that grand juries have been instructed that they have a duty to indict upon a finding of probable cause, but contends

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clear by the close of the government's case-in-chief. See J.A. 29-37. At that point, respondent had every opportunity to testify as he now suggests. Instead, the defense rested without presenting respondent or any other witness (or seeking a continuance), see J.A. 47, and merely contended that the evidence was legally insufficient, see J.A. 55-58.

that those instructions should be given little weight because they merely constitute "the views of individual jurists" and conflict with the Framers' conception of the grand jury. NAFD, however, overlooks that such instructions have been delivered since the earliest days of the Republic, dating from an instruction delivered by Chief Justice Jay while the Bill of Rights were in the process of being ratified. See U.S. Br. 31 n.10. And NAFD likewise ignores the fact that the model grand jury charge, approved by the Judicial Conference of the United States, contains such an instruction—which has been upheld against the claim that it improperly forecloses grand juries from engaging in nullification. See *United States* v. *Navarro-Vargas*, 408 F.3d 1184, 1202-1206 (9th Cir.), cert. denied, 126 S. Ct. 736 (2005). Such instructions show that, while grand jury nullification has occasionally occurred even after the adoption of the Constitution, it has never been formally sanctioned.

NAFD more broadly contends (Br. 10-13) that grand juries effectively exercise the same discretion as prosecutors in deciding whether prosecutions should go forward. It is certainly true that grand juries serve as a check on prosecutors, in the sense that they may prevent a prosecution from going forward when the evidence is insufficient (and that they have the *power* to prevent a prosecution from going forward even when the evidence is sufficient). But it would not only depart from the role traditionally assigned to grand juries to conclude that grand juries may *legitimately* choose not to indict notwithstanding the existence of probable cause. It would also raise separation-of-powers concerns to assign grand juries a form of prosecutorial discretion. It is the President in whom "executive Power" is vested and who has the duty to "take Care that the

Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. Prosecutorial discretion is a critical incident of the President's authority under the Take Care Clause, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and is subject to political checks. If a federal prosecutor abuses his power by bringing prosecutions that the public believes are inappropriate, the executive may be held accountable through the political process for poorly exercising its discretion, or Congress can amend the law. Grand juries are neither elected nor accountable to the public; their role is not to second-guess public policy, but to protect against factually unfounded prosecutions. See U.S. Br. 32-33. It would contravene our constitutional structure to allow the grand jury to short-circuit the political process by making judgments about the exercise of prosecutorial discretion or the wisdom of enacted laws.[9]

2. Even assuming that a grand jury may legitimately refuse to indict notwithstanding the existence of probable cause, it does not follow that the failure to instruct the grand jury on an offense element should be treated as intrinsically harmful. Respondent's amici contend that (1) the failure to instruct the grand jury on one element of the crime may impair the grand jury's ability to engage in nullification and (2) that, notwithstanding evidence that petit juries (like grand juries) have sometimes engaged in nullification, grand

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[9] While this Court has noted that the Constitution does not "textually assign[]" the grand jury to any of the three branches, *United States* v. *Williams*, 504 U.S. 36, 47 (1992), it has treated the grand jury's decision to indict as a "substitute" for the decision of a judicial officer with regard to the existence of probable cause, *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975).

jury errors should nevertheless be treated differently. NACDL Br. 22; NAFD Br. 23-24, 26 n.14.

As to the first point, NAFD speculates (Br. 23-24) that, where the evidence concerning the omitted element is weak, a grand jury may have seized on that fact to nullify—but is disabled from doing so when the element is omitted. That speculation, however, seems strained. Indeed, a grand jury may be *more* likely to nullify when an element is omitted, insofar as jurors believe that the remaining elements should not constitute a criminal offense at all. And because a grand jury error will be found harmless only when the evidence at trial proves the omitted element beyond a reasonable doubt, the harmless-error rule at issue will not apply where the evidence is "weak."

As to the second point, respondent's amici do not explain why grand juries and petit juries should be treated differently for purposes of harmless-error analysis. Indeed, to the extent that they differ, petit juries offer *greater* protections for the accused, as NAFD notes. See Br. 26 n.14. That fact counsels in favor of, not against, applying harmless-error review to grand jury errors. See U.S. Br. 16-17; p. 3, *supra*.

E. The Omission Of The "Overt Act" Element From Respondent's Indictment Was Harmless

In a case involving a grand jury error, the test for harmless-error analysis is whether it is clear beyond a reasonable doubt that, but for the error, a rational grand jury would still have returned an indictment. Respondent and NACDL do not dispute that proposition, but instead effectively challenge this Court's further holding in *Mechanik* that, where a properly instructed petit jury subsequently finds the defendant

guilty, an error at the grand jury stage should be treated as harmless. The Court, however, should adhere to that holding and apply it here.

1. Respondent notes (Br. 25) that, "if the prosecutor cannot establish guilt under the probable cause standard, the odds are small that guilt could be established under the reasonable doubt standard." What is relevant, however, is that, where the petit jury finds that an offense element has been proved beyond a reasonable doubt, the odds are remarkably high that the grand jury also would have found that there was probable cause to believe that the element had been satisfied. And even in the rare case in which the grand jury would not have found probable cause, it would be pointless to reverse the jury's verdict, because the government would ordinarily be able to reindict and reconvict the defendant on remand based on the evidence presented at trial. Consideration of the petit jury's verdict is therefore appropriate even if that verdict does not *conclusively* establish that the grand jury would have found probable cause as to the omitted element.

2. NACDL offers various policy-based reasons in support of a contrary rule, all of which lack merit. First, NACDL contends (Br. 26) that, unless the error at issue were deemed to be structural, "trial judges would not have an incentive to dismiss constitutionally defective indictments." The ordinary presumption, however, is that judges will follow the law, especially the Constitution, without any need to create "incentives" for them to do so. See, *e.g.*, *Mickens* v. *Taylor*, 535 U.S. 162, 173 (2002). Second, NACDL suggests (Br. 26) that "a petit juror may be influenced by a grand jury's determination of probable cause." To the extent that is true, however, the more sensible solution would be to instruct petit ju-

ries not to consider the issuance of an indictment in determining guilt—not to treat as structural any error that may have affected the grand jury's decision to return an indictment. Third, NACDL asserts (Br. 27) that, "[i]n the event a petit jury * * * declines to convict a defendant at trial, the ramifications [from an indictment] may still be severe." That point is irrelevant when the petit jury *does* convict the defendant—and, in any event, any reputational harm that a defendant suffers simply by virtue of being indicted is not cognizable at law, as reflected by the settled rule that a defendant usually may not take an interlocutory appeal from the denial of a motion to dismiss the indictment (and may not appeal at all if he is subsequently acquitted). See 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3918.1, at 424 (2d ed. 1992) (Wright).

In this case, because it is undisputed that the petit jury was correctly instructed concerning the offense element at issue, the omission of that element from the indictment is necessarily harmless. The court of appeals thus erred by reversing respondent's conviction.

F. Rule 34 Does Not Preclude Harmless-Error Review Of The Omission Of An Offense Element From A Federal Indictment

Finally, respondent suggests (Br. 1, 7) that Federal Rule of Criminal Procedure 34, the rule governing motions for arrest of judgment, precludes application of harmless-error review to the omission of an offense element from a federal indictment. In relevant part, Rule 34(a) provides that, "[u]pon the defendant's motion or on its own, the court must arrest judgment if * * * the indictment * * * does not charge an offense." As respondent recognizes (Br. 7), however, "[m]otions for this

relief are rarely made, and it is even rarer that they are granted." 3 Wright § 571, at 615 (3d ed. 2004). The better reading of Rule 34 is that it merely specifies *when* a defendant may object to a deficiency in the indictment before the district court in order to preserve that objection; it does not specify the standard of review that the district court should apply to such an objection. Cf. 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(e), at 779 (2d ed. 1999) (noting that, "[i]n considering essential elements objections first raised after conviction, appellate courts are fully aware of the defense incentive to sandbag and they often react accordingly"); *United States* v. *Thompson*, 356 F.2d 216, 226 (2d Cir. 1965) (noting that "the courts of the United States long ago withdrew their hospitality toward technical claims of invalidity of an indictment first raised after trial, absent a clear showing of substantial prejudice to the accused"), cert. denied, 384 U.S. 964 (1966). As respondent acknowledges (Br. 1), Rule 34 must be read *in pari materia* with Rule 52(a), the harmless-error rule, which presumptively applies to "*all* errors where a proper objection is made." *Neder*, 527 U.S. at 7. At a minimum, Rule 34 does not contain the "strong support" necessary to find an implied repeal of Rule 52(a) in this context. *Zedner* v. *United States*, 126 S. Ct. 1976, 1989 (2006); *United States* v. *Vonn*, 535 U.S. 55, 65 (2002).

CONCLUSION

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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